



FEMA

November 18, 2009

BY HAND-DELIVERY

Clerk of the Board  
Civilian Board of Contract Appeals  
1800 M Street, N.W.  
6<sup>th</sup> Floor  
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1759-FEMA

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BOARD OF  
CONTRACT APPEALS  
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Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Sewerage and Water Board of New Orleans and filed as CBCA-1759-FEMA. Submitted with the Response is a binder(s) of exhibits.

**Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or [lindam.davis@dhs.gov](mailto:lindam.davis@dhs.gov); and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or [kim.hazel@dhs.gov](mailto:kim.hazel@dhs.gov).**

Very truly yours,

Chad T. Clifford  
General Attorney  
Office of Chief Counsel  
DHS/Federal Emergency Management Agency  
500 C St., S.W.  
Washington, D.C. 20472

cc: To the Applicant:

Mr. Jason Higginbotham, LEM  
Director of Emergency Management  
Sewerage and Water Board of New Orleans  
635 St. Joseph Street  
New Orleans, LA 70165

To the State:

Mr. Paul W. Rainwater  
Governor's Authorized Representative  
Governor's Office of Homeland Security and Emergency Preparedness  
7667 Independence Boulevard  
Baton Rouge, LA 70806

To the Region:

Mr. Gary Jones  
Acting Regional Administrator  
800 N. Loop 288  
Denton, TX 76209



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Very truly yours,

A handwritten signature in black ink, appearing to read "Chad T. Clifford".

Chad T. Clifford  
General Attorney  
Office of Chief Counsel  
DHS/Federal Emergency Management Agency  
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cc: To the Applicant:

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**SEWERAGE AND WATER BOARD OF NEW ORLEANS  
EAST BANK WASTEWATER TREATMENT PLANT  
GENERATORS  
PWs #13231 and #18528  
FEMA-1603-DR-LA  
DOCKET # CBCA 1759-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO  
ARBITRATION REQUEST OF SEWERAGE AND WATER BOARD OF NEW  
ORLEANS**

On October 19, 2009, the Federal Emergency Management Agency (FEMA) received the request of Sewerage and Water Board of New Orleans (Applicant) to arbitrate FEMA's denial of funding for Project Worksheet (PW) 13231 and PW 18528. See Exhibit 1. PW 13231 represents FEMA's denial of \$330,000 for preliminary engineering to assess alternative sources of power for the East Bank Wastewater Treatment Plant (EBWTP). PW 18528 represents FEMA's denial of \$5,935,000 to design, procure, and install a four-megawatt generating system as a stand-by source of power for the EBWTP. The following constitutes FEMA's response to the Applicant's arbitration request.

**JURISDICTION**

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes the option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

The Applicant meets regulatory guidelines for filing an arbitration request as outlined in 44

C.F.R. § 206.209 to the extent:

- PW 13231 and PW 18528 request reimbursement for work that FEMA has determined is not eligible under the Stafford Act.
- The arbitration request for \$6,265,000 exceeds the \$500,000 arbitration project threshold.
- The Applicant appealed FEMA's determination in PW 13231 and PW 18528 on January 14, 2009.
- The Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) submitted the Applicant's first appeal to FEMA on March 18, 2009.
- FEMA denied the Applicant's first appeal on July 7, 2009.
- The Applicant filed a second appeal on August 28, 2009.
- The Applicant filed a Request for Arbitration and withdrew its second appeal on October 15, 2009.

## SUMMARY OF FEMA'S POSITION

The estimated amount of \$6,265,000 for the preliminary engineering assessment and the design, procurement, and installation of a four-megawatt generating system as a stand-by source of power for the EBWTP is not eligible for reimbursement pursuant to applicable law, regulation, and policy.

FEMA Public Assistance funding eligibility is limited to the restoration of damaged facilities owned and operated by the Applicant to the pre-disaster function and design capacity of the facility, in accordance with applicable codes and standards in effect at the time of the disaster. See 44 C.F.R. § 206.226. FEMA PA may also fund certain cost-effective hazard mitigation measures. Id. The pre-disaster function and design capacity of the EBWTP did not include a backup generator on site. Prior to the disaster, Entergy New Orleans (a private energy company) supplied backup power to the EBWTP. The requested onsite backup generator was not required by any code or standard in effect at the time of the disaster; moreover, there is no such requirement post-event. Further, the requested generator does not meet PA eligibility criteria for hazard mitigation. Thus, FEMA's denial of PW 13231 and PW 18528 is consistent with the Stafford Act and applicable FEMA regulation and policy. As such, FEMA's decisions were neither arbitrary and capricious, nor an abuse of discretion, and were otherwise within the law.

## BACKGROUND

### The Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidential-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").<sup>1</sup> See 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36, 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the Declared-area. See 42 U.S.C. § 5170.

Under the Stafford Act, FEMA may provide, *inter alia*, Public Assistance. The Stafford Act states that FEMA "may make contributions" for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.206. PA funding can be provided in the form of grants for the state or local government's own recovery efforts, or FEMA may provide direct federal assistance, by which a federal agency directly performs the recovery work. See 44 C.F.R. §§ 206.203, 206.208. FEMA may also fund repairs to eligible private nonprofit facilities, such as the EBWTP. See 44 C.F.R. § 206.223(b).

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<sup>1</sup> The Stafford act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164.



To be eligible for PA funding, the applicant must own or operate an eligible facility as defined by FEMA regulations, the facility must be damaged as a result of a declared major disaster, the facility must be within the disaster declared-area, and the facility must be the legal responsibility of the eligible applicant. See 42 U.S.C. § 5122; see also 44 C.F.R. §§ 206.221-223, 206.226(c)(1). Under the PA program a Federal inspection team accompanied by local representatives survey the damage and estimate the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs document damage caused by the disaster, and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion, FEMA reviews the PW in order to make determinations of whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or sub-grantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The Sewerage and Water Board of New Orleans is a sub-grantee of the State for PW 13231 and PW 18528. See 44 C.F.R. § 206.201(l).

### **Appeals and Arbitration**

The Stafford Act authorizes appeals of PA decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal - the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, established a new option for arbitration under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209. A decision of a majority of this Panel shall constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

### **The Declaration**

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including restoration of damaged facilities. See Exhibit 2. Furthermore, the President's declaration included Orleans Parish. As the EBWTP is located within Orleans Parish, the Applicant may be reimbursed through FEMA PA for eligible emergency work and permanent repairs. Restoration of damaged facilities includes funding for either repair or replacement of eligible facilities on the basis of the design of such facilities as they existed immediately prior to a major disaster declaration. See 42

U.S.C. § 5172; see also 44 C.F.R. § 206.226. When a facility must be repaired or replaced, FEMA may pay for upgrades that are necessary to meet specific requirements of reasonable codes and standards. See 42 U.S.C. § 5172(e); see also 44 C.F.R. § 206.226(d).

**Sewerage and Water Board of New Orleans Project – East Bank Wastewater Treatment Plant Backup Generator**

The EBWTP is owned by the Applicant and operated by Veolia Water North America (Veolia). The Applicant provides sewerage and water services throughout Orleans Parish, Louisiana, including the City of New Orleans. Hurricane Katrina caused catastrophic damage resulting from inundation of the EBWTP with 16 feet of contaminated flood water.

Prior to Hurricane Katrina, Entergy New Orleans (Entergy), a private energy corporation, provided primary and backup power to the EBWTP by dual power feeders, each serving the facility from different sections of the City of New Orleans. See Applicant Exhibit at 00057. The primary source was a 13.8 KV feeder line from the Arabi substation. Id. The secondary source was from a feeder from the Florida Avenue and Tricou Street substation. Id. This redundant power supply met applicable pre-disaster operating permit requirements. See Applicant Exhibit at 00002-00003. Hurricane Katrina damaged both of these feeder lines, leaving the EBWTP without power for several weeks and unable to treat raw sewage. See Applicant Exhibit at 00024. In November 2005, Entergy New Orleans restored the primary power feed to the EBWTP. See Applicant Exhibit at 00012.

FEMA prepared multiple PWs as a temporary measure, placing seven generators throughout the EBWTP to provide emergency power for plant operations through December 31, 2006. See

Exhibit 3. FEMA authorized funding of these temporary generators as necessary emergency protective measures.<sup>2</sup>

The Applicant claims that multiple power outages occurred and unstable voltage impacted operations at the EBWTP after the disaster and throughout 2006. See Applicant Exhibit at 00057-00058. Given the alleged continued instability of the power supply, the Applicant sought funding from FEMA for preliminary engineering work to assess alternative sources of permanent backup power for the EBWTP. See Applicant Exhibit at 00057. On August 17, 2006, FEMA denied the Applicant's request for \$330,000 to fund the preliminary engineering work identified in PW 13231. Applicant Exhibit at 00020. FEMA determined the PW scope of work ineligible because a new permanent source of backup power was not required to repair disaster-related damage to an eligible facility. Id.

In October 2006, Veolia, the EBWTP operator, expressed concern with FEMA's December 31, 2006, deadline to remove the temporary emergency generators located at EBWTP: "Without dependable source power and a dependable backup supply for emergency use, all wastewater flow will bypass the treatment plant and enter the Mississippi River, untreated." See Applicant Exhibit at 00057. In response to this concern, FEMA prepared a PW to extend funding for four temporary generators at the EBWTP beyond the December 31, 2006 deadline. See Exhibit 4.

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<sup>2</sup> Funding for emergency protective measures is authorized by Section 403 of the Stafford Act. See 42 U.S.C. § 5170b(a)(3). Eligibility criteria for emergency protective measures are different from eligibility criteria for the permanent restoration or repair of damaged facilities authorized by Section 406 of the Stafford Act. See 42 U.S.C. § 5172. In order to be eligible, emergency protective measures must: (1) eliminate or lessen immediate threats to life, public health or safety; or (2) eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective. See 44 C.F.R. §§ 206.201(b), 206.225(a).

In a January 2007 letter, Veolia informed the Applicant that Entergy made “substantial improvements” to the electrical system serving the EBWTP in late 2006, eliminating power outages and reducing the frequency of voltage fluctuations. See Applicant Exhibit at 00055. Despite the reported progress, not all of the electrical service issues had been resolved. Veolia cited voltage drops in late December 2006 and power fluctuations as a potential cause of damage to a temporary generator that occurred during a failed attempt to transfer the load from the temporary generator to Entergy power. Id. Veolia informed the Applicant: “As Entergy continues to improve its system the need for the Emergency generator diminishes and its removal as an emergency backup becomes likely.” Applicant Exhibit at 00056. Entergy restored dual power service to the EBWTP in January 2007. See Applicant Exhibits 00012 and 00054; see also Exhibit 5.

FEMA provided funding for emergency generators as an emergency protective measure to supply power until Entergy was able to re-establish the dual power feeds that existed prior to Hurricane Katrina. Funding for these *temporary* emergency generators terminated in March 2007, after Entergy re-established the *permanent* dual power feeds to the EBWTP. See Exhibit 4 and Applicant Exhibit 00012. Veolia did not report any issues with the power supply between January 2007 and late 2008, when the Applicant noted that the restored primary and backup power supplies proved unreliable during the 2008 Hurricane Season.<sup>3</sup> See Applicant Exhibit at 00012.

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<sup>3</sup> These separately declared disaster events occurred after Entergy had re-established the pre-Hurricane Katrina primary and backup power supply functions for the EBWTP.

On September 22, 2008, the Applicant requested funding to design, procure, and install a four-megawatt generating system as a *permanent* standby source of power for the EBWTP. See Applicant Exhibit 00041-00046. FEMA prepared PW 18528 in February 2009 and denied the Applicant's request for \$5,935,000 to fund this project. See Applicant Exhibit at 00023-00032. FEMA determined the PW ineligible under the PA program because the requested generator "was not an element of the (EBWTP) prior to the disaster, does not exist today, and is not a damaged element" of the facility. See Applicant Exhibit at 00026. Furthermore, Entergy New Orleans had restored the EBWTP's pre-disaster primary and backup power sources, which met the standards outlined in EBWTP's Water Discharge Permit issued by the Louisiana Department of Environmental Quality (LDEQ). Id.

## **PROCEDURAL HISTORY**

### **First Appeal**

The Applicant appealed FEMA's determination for PW 18528 in a letter dated January 14, 2009. See Exhibit 6. The Applicant claimed that the scopes of work identified in both PW 13231 and PW 18528 are required to comply with applicable codes and standards. Specifically, the first appeal letter cited the need to comply with an Administrative Order (AO) from the United States Environmental Protection Agency (EPA) requiring the provision of adequate auxiliary power for the EBWTP to ensure functionality during weather events. Id.; see also Applicant Exhibit at 00067-00068.

The referenced AO is dated January 10, 2006. See Applicant Exhibit at 00067. The Applicant explained that prior to Hurricane Katrina, the EBWTP operated in compliance with permit requirements and EPA standards for backup emergency power. Applicant Exhibit at 00002-

00003. The Applicant claimed these permit requirements were amended after the disaster, but failed to provide substantive documentation to support this claim. See id. The Applicant also suggested that funding for the onsite backup generator could be provided through Section 406 hazard mitigation. See Applicant Exhibit at 00003. The State of Louisiana's Governors Office of Homeland Security and Emergency Preparedness (GOHSEP) supported the Applicant and transmitted the first appeal to FEMA by letter dated March 18, 2009. See Exhibit 7.

FEMA denied the Applicant's first appeal on July 7, 2009, because the generator system was not in place prior to the disaster and therefore was not a damaged element of the EBWTP; primary and backup power had been restored to the EBWTP via the same private provider used prior to Katrina; an internal generator system is not a requirement of a code or standard that was in effect at the time of the disaster; and, the generator would not prevent similar damage to the EBWTP in a future event. See Applicant Exhibit at 00007-00009. As such, FEMA found no basis to fund the Applicant's project under Sec. 406 of the Stafford Act (42 U.S.C. § 5172). See Applicant Exhibit at 00009.

### **Second Appeal**

In its second appeal, dated August 28, 2009, the Applicant argued that the requested generator would replace a "damaged element" and is required by the EBWTP operating permit. See Applicant Exhibit at 00010-00011. The Applicant also claimed that the generator is necessary to ensure continued operation during and after a significant weather event and avoid costly repairs and an environmentally dangerous plant bypass event. See Applicant Exhibit at 00013.

### **Request for Arbitration**

The Applicant now files this request for arbitration in lieu of filing an appeal under 44 C.F.R. § 206.206 and has withdrawn its pending second appeal with FEMA via letter dated October 15, 2009 (revised 10/16/09). See Exhibit 8. The Applicant asserts that purchase and installation of a new four megawatt emergency generator is eligible because the backup power supply is necessary to restore pre-disaster function. See Exhibit 1 at 3-4. The Applicant also contends that the backup generator is required to ensure future operation of the EBWTP in accordance with applicable permit requirements. Id. Also, on October 29, 2009, GOHSEP submitted a letter in support of the Applicant's request.<sup>4</sup> See Exhibit 9.

### STANDARD OF REVIEW

This Panel must afford considerable deference to FEMA's interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (explaining that the "ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation"); Hawaiian Elec. Co., Inc. v. E.P.A., 723 F.2d 1440, 1447 (9th Cir. 1984). As with judicial review under the Administrative Procedure Act (APA), this Panel must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-831 (9<sup>th</sup> Cir. 1986). The Agency's decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415; Friends of the Earth v. Hintz, 800 F.2d at 831. Under the "highly deferential" standard of APA review, this Panel, like a court, "may not

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<sup>4</sup> GOHSEP did not provide or introduce any new information, or raise new issues in its response.



substitute [its] judgment for that of the agency” but instead must presume “the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision.” Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1075-76 (9th Cir. 2006) (internal citations omitted).

## **ARGUMENT**

A major disaster is by definition an event for which Federal assistance is necessary “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122(2). The “Repair, Restoration, and Replacement of Damaged Facilities” authorized by the Stafford Act are for the cost of repairing, restoring, reconstructing, or replacing a public facility damaged by a major disaster on the basis of the design of such facility as it existed immediately prior to the disaster. An eligible facility under the PA program is a building, works, system, or equipment (built or manufactured), or an improved and maintained natural feature, that is owned by an eligible public or Private Nonprofit (PNP) applicant.” 42 U.S.C. § 5122 (9)-(10).

To be eligible for financial assistance, an item of work must be required as the result of the major disaster event, be located within a designated disaster area, and be the legal responsibility of an eligible applicant. See 44 C.F.R. § 206.223(a). When a facility must be repaired or replaced, FEMA may pay for upgrades to the damaged facility that is necessary to meet specific requirements of applicable codes and standards. See 44 C.F.R. § 206.226(d). However, the provision of a function and design capacity that did not exist prior to a declared event is not eligible for funding. See 44 C.F.R. § 206.201(g)-(h), and FEMA 322 (1999), pp. 79 and 83. Section 406 of the Stafford Act also grants FEMA discretionary authority to fund certain cost-

effective hazard mitigation measures. See 42 U.S.C. § 5172(e); 44 C.F.R. § 206.226(b); and Exhibit 10. However, the generator at issue here is not an eligible mitigation measure under the PA program, as its installation would not prevent future flood and wind damage, similar to that which occurred at the facility during Hurricane Katrina. See Exhibit 10.

**I. Onsite Power Generation Was Not A Pre-Disaster Function or An Element of the Design Capacity of The EBWTP**

An onsite backup power generation system that was not in place at the time of the disaster is not an eligible PA facility.

The Applicant's Arbitration Request asserts that the facility has not been restored to its pre-disaster function because the backup power supply (the "damaged entity") has not been restored. See Exhibit 1 at 3. However, the Applicant did not own backup power supply generation equipment prior to the disaster. The Stafford Act permits FEMA to assist eligible Applicants to restore damaged public facilities with PA funding, but the law specifically limits FEMA PA funding to an estimate of the cost to repair, restore, reconstruct or replace an eligible facility "on the basis of the design of the facility as the facility existed immediately before the major disaster."<sup>5</sup> 42 U.S.C. § 5172 (e)(1)(A)(i). Furthermore, the damaged elements of the facility must be the legal responsibility of the Applicant. 44 C.F.R. § 206.223(a)(3).

The Applicant's facility had no on-site backup power at the time of the disaster. Rather, such backup power was supplied by Entergy New Orleans (an independent private entity), which provided dedicated "feeder" lines to the facility from its Florida Avenue and Tricou Street substations. See Applicant Exhibit at 00057; see also Applicant Exhibit at 00002-00003.

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<sup>5</sup> The Stafford Act also allows funding of repairs or upgrades to damaged public facilities "in conformity with codes, specifications, and standards applicable at the time at which the disaster occurred." 42 U.S.C. § 5172 (e)(1)(A)(ii). This aspect of Statute and its applicability to the Applicant's arbitration request is discussed later in this response.

Hurricane Katrina damaged these Entergy power substations, knocking out power to the EBWTP. See Applicant Exhibit at 00025. However, Entergy, being the entity with legal responsibility for the repair or restoration of these power feeds that served the EBWTP, made the necessary repairs and fully restored services to the EBWTP in January 2007. See Applicant Exhibit at 00012 and Applicant Exhibit at 00054; see also Exhibit 5.

Regardless, the Applicant's Arbitration Request attempts to assert that the backup power supply itself is the "damaged entity" and that the new onsite backup generator is required to restore EBWTP operations in conformance with applicable permit requirements:

"[W]e [the Applicant] have demonstrated that the damaged entity is the backup power supply that is required for the State Department of Environmental Quality permit which has not been restored." Exhibit 1 at 3.

That argument is indefensible, because backup power generation here is not an eligible facility under the PA program. Power generating facilities that are owned and or operated by public and private non-private entities may be eligible for PA assistance to repair disaster-related damage. However, here "electric power" is not an eligible facility under the PA program because the Applicant purchased power for the EBWTP from Entergy prior to Hurricane Katrina, and continued to do so after Hurricane Katrina, to satisfy existing requirements for a backup power supply. Furthermore, as described above, backup power generation did not exist at the facility pre-event, and the repair or replacement of non-existent backup power generation at the facility pre-event is not eligible under the PA program. Rather, Entergy, as the entity with legal responsibility for the repair or restoration of these power feeds that served the EBWTP, made the

necessary repairs and fully restored backup power generation services to the EBWTP in January 2007. See Applicant Exhibit at 00012 and Applicant Exhibit at 00054; see also Exhibit 5.

Additionally, in its Request for Arbitration, the Applicant proposed that the operating permit *itself* was affected by the disaster and that the proposed generator is eligible in order to restore permit compliance. See Exhibit 1 at 3. Regardless of this new assertion by the Applicant, the operating permit does not meet the definition of a facility eligible for assistance under the PA program. See 44 C.F.R. §§ 206.201(c), 206.221(h). As such, any post-Katrina operating permit requirements have no relevance as to eligibility determinations under the PA Program. This argument also fails because the law limits FEMA PA funding to an estimate of the cost to repair, restore, reconstruct or replace eligible facilities “in conformity with codes, specifications, and standards...applicable at the time at which the disaster occurred.” 42 U.S.C. § 5172 (e)(1)(A).

As shown, the pre-disaster function and design capacity of the EBWTP did not include power generation. See Applicant Exhibit at 00057. Because back up power generation was not part of the function or design capacity of the facility at the time of the disaster, the cost to reimburse the Applicant for purchase and installation of an applicant-owned four megawatt generator, as requested in PW 13231 and PW 18528, is ineligible. Thus, FEMA’s denial of PW 13231 and PW 18528 on these grounds is consistent with applicable law, regulation, and policy, and therefore not arbitrary or capricious.

## **II. New Backup Power Generation is Not a Required Codes and Standards Upgrade**

### **1. There was no pre-disaster codes or standards requirement for on-site backup power generation.**

Prior to the disaster, the EBWTP operated in compliance with the LDEQ permit (effective January 1, 2003) and EPA standards, as the EBWTP was served by separate dual power feeds from at least two different Entergy substations. See Applicant Exhibit at 00002-00003. The LDEQ permit in effect at the time of the disaster required the provision of “an alternate source of electric power” to the EBWTP to allow continuity of operation during power failures. Applicant Exhibit at 00073. The permit allowed the Applicant two options for compliance: (1) Connection of “at least two independent power sources such as substations” with a recommended separate power line from each substation; or (2) a portable or in-place internal combustion power generator. Id. Entergy, as the entity with legal responsibility for the repair or restoration of these power feeds that served the EBWTP, made the necessary repairs and fully restored backup power generation services to the EBWTP in January 2007. See Applicant Exhibit at 00012 and Applicant Exhibit at 00054; see also Exhibit 5. The restoration of these services by Entergy in January 2007 was sufficient to meet the requirements of the LDEQ permit.

### **2. There is no post-event codes and standards requirement for on-site backup power generation.**

The Applicant asserts that post-event codes and standards require on-site backup power generation at the facility. However, the Applicant has failed to demonstrate that the requested backup generator is a specific post-disaster requirement of the EBWTP operating permit.

In its first appeal, the Applicant asserted that the requirement for a standby generator was a requirement of a code and standard in effect at the time of the disaster, and also that this permit

requirement was “consequentially amended” after Hurricane Katrina. Applicant Exhibit at 00003 (emphasis in original). The Applicant’s first appeal references EPA Emergency Order (EO), Docket Number CWA-06-2006-1852. Id. The EO instructed the Applicant to provide a schedule to repair, renovate, and reconstruct the EBWTP to pre-Katrina conditions and to protect the facility from a future weather catastrophe. See Exhibit 12 at 5-6. Among the tasks identified by the EO in relation to the EBWTP, Task #5 directs the Applicant to: “Provide adequate and stationary auxiliary power for the effluent pump, other critical units, and the treatment facilities so that said units and facilities will remain functional in weather events.” Id. at 6. This auxiliary power requirement is fulfilled by the dual power feeds supplied from at least two different Entergy substations. See Exhibit 5.

Furthermore, a January 2007 letter from Veolia, the company hired by the Applicant to operate the EBWTP in compliance with applicable permit requirements, acknowledged Entergy’s restoration of the dual feeders and noted that: “As Entergy continues to improve its system, the need for the Emergency generator diminishes and its removal as an emergency backup becomes likely.” This statement is evidence that an applicant owned emergency backup generator was not needed to maintain compliance with the LDEQ permit and the subsequent EPA AO in the post-Katrina regulatory environment. Rather, backup power generation is provided by Entergy, a private entity, and meets all known regulatory requirements. See Applicant Exhibit at 00056.

Additionally, GOHSEP, in support of the Applicant, asserts that post-disaster EPA “order[ed] the Applicant to ‘Procure and construct auxiliary diesel/electric power facilities ...’ ” See Applicant Exhibit at 00078. However, the exhibit referenced by the Applicant is not an EPA order

mandating actions, and, in fact, has no binding effect on the Applicant. Rather, the exhibit referenced is a letter from the Department of Justice (DOJ) to the Applicant's counsel concerning ongoing discussions between DOJ and the Applicant regarding the Applicant's request for continued extension of *force majeure* protection from the United States. See Applicant Exhibit at 00077. This DOJ letter indicates that the United States would agree to a continued extension of *force majeure* protection if the Applicant met requested "interim measures," which include the "procure[ment] and construct[ion] of auxiliary diesel/electric power facilities ..." at the EBWTP. Id. at 000077-78. If the Applicant failed to procure and install auxiliary diesel/electric power facilities the Applicant would not be out of compliance with an applicable permit requirement; rather, the Applicant simply may not receive continued *force majeure* protection from the United States. Therefore, this referenced DOJ letter has no bearing as to the Applicant's existing post-disaster permit requirements.

The Applicant has otherwise failed to provide any evidence of applicable codes and standards that have changed subsequent to the disaster. Furthermore, if the Applicant were able to demonstrate as such, they would also have to demonstrate that the current solution of supplying backup power by arrangement with Entergy is no longer acceptable to the Louisiana DEQ and the EPA. To date, the Applicant has failed to provide such evidence.

3. Applicant's claim for eligible work associated with applicable codes and standards fails to meet FEMA regulatory requirements.

*Prima facie* support in law for rejection of the backup generator notwithstanding, the Applicant claimed that its request is consistent with FEMA regulations regarding the eligibility of work in compliance with applicable codes and standards. See Exhibit 1 at 4. The pertinent regulation

establishes five specific eligibility criteria for codes and standards upgrades. 44 C.F.R. § 206.226(d); FEMA 322 (1999), p. 27-28. *All five criteria must be met for an applicable codes and standards upgrade to be eligible.* FEMA's basis for denial of the Applicant's request is explained further in context of each of the following five eligibility criteria.

**Criterion 1:** The code or standard must apply to the type of repair or restoration work being performed. 44 C.F.R. § 202.226(d)(1).

As previously discussed, the Applicant has not demonstrated that the new backup generator is required to repair or restore the pre-disaster function and design capacity of the EBWTP. The pre-disaster function and design capacity of the eligible facility, i.e., EBWTP, did not include power generation, which makes the requested PWs for the purchase and installation of a backup power generator ineligible for PA funding. See Applicant Exhibit at 00057; see also 44 C.F.R. § 206.201(g)-(h), and FEMA 322 (1999) p. 79-83. Rather, the backup power source function was supplied by Entergy New Orleans, which is a private, for-profit entity. See Exhibit 11. Private for-profit corporations and their facilities are ineligible for PA funding assistance. See 44 C.F.R. §§ 206.222-223. Furthermore, Entergy made the necessary repairs and fully restored backup power generation services to the EBWTP in January 2007 in full satisfaction of the applicable permit. See Applicant Exhibit at 00012 and Applicant Exhibit 00054; see also Exhibit 5. Therefore, the Applicant's assertion that an undocumented post-disaster permit requires a new backup generator does not meet this eligibility criterion of the pertinent FEMA regulation.

**Criterion 2:** The code or standard must be appropriate to the pre-disaster use of the facility. 44 C.F.R. § 202.226(d)(2).

Prior to the disaster, the EBWTP relied on power generated and transmitted to the facility by Entergy at an off-site, ineligible facility. See Applicant Exhibit at 00057. This dual power



supply met applicable standards for pre-disaster use of the EBWTP. Applicant Exhibit at 00002-00003. Entergy has since restored the pre-disaster dual power supply. See Exhibit 5. The Applicant's assertion that an undocumented post-disaster permit requires a new backup generator is not appropriate to the pre-disaster use of the facility, and therefore does not meet this eligibility criterion of FEMA regulation.

**Criterion 3:** The code or standard must be reasonable, formally adopted in writing, and implemented prior to the disaster declaration, or be a legal Federal requirement applicable to the type of restoration. 44 C.F.R. § 202.226(d)(3).

The EBWTP water discharge permit from LDEQ was in writing and was implemented prior to the disaster, dated December 20, 2002. See Applicant Exhibit at 00071. The permit required the provision of "an alternate source of electric power" to the EBWTP to allow continuity of operation during power failures. See Applicant Exhibit at 00073. The permit allowed the Applicant two options for compliance, including connection of at least two independent power sources, such as substations or a standby generator. See id. Prior to the disaster, the EBWTP operated in compliance with this LDEQ permit by relying on separate dual power feeds from at least two different Entergy substations. See Applicant Exhibit at 00002-00003 and Applicant Exhibit at 00057.

The Applicant does not claim that a new backup generator is a necessary requirement of the permit in place at the time of the disaster. See Applicant Exhibit at 0003. Instead, the Applicant claims that the generator is needed to comply with water discharge permit conditions as amended by the EPA EO, as well as the January 25, 2008, DOJ letter. However, as discussed above, the Applicant has failed to provide any documentation to support their assertion that a new backup

generator is in fact needed pursuant to an applicable Federal requirement. Thus, the Applicant has failed to demonstrate that this eligibility criterion is met.

**Criterion 4:** The code or standard must apply uniformly to all similar facilities within the jurisdiction of the owner of the facility. 44 C.F.R. § 206.226(d)(4).

The EPA EO, which the Applicant erroneously cited as evidence of an applicable codes and standards requirement for a new onsite backup generator, is specific to the EBWTP water discharge permit No. LA0038091, and does not apply to any other facility owned by the Applicant. See Exhibit 12. Furthermore, the Applicant has failed to demonstrate that any similar requirement applies uniformly to other similar facilities owned by the Applicant. As such, the Applicant has failed to demonstrate that this eligibility criterion is met.

**Criterion 5:** Any code or standard in effect at the time of the disaster must have been enforced during the time that it was in effect. 44 C.F.R. § 206.226(d)(5).

The Applicant was not required to have on-site backup power generation via an onsite generator pre-disaster. Rather, the Applicant claims that a new backup generator is eligible because it is required by an undocumented *post-disaster* permit: “While we have heard FEMA say that the ‘code must have been in effect when Katrina hit’; we maintain that it was in effect – it was consequentially amended...” (emphasis in original) Applicant Exhibit 0003. The Applicant’s statement demonstrates that its request does not meet this eligibility criterion of FEMA regulation.

As detailed above, the Applicant can neither support its assertion that the costs to purchase and install a new onsite backup generator are required by applicable codes and standards and, therefore eligible, nor can it demonstrate that this work meets the eligibility criterion of the

pertinent regulation. Thus, FEMA's decision to deny PW 13231 and PW 18528 on these grounds is consistent with regulation, and therefore was not arbitrary or capricious.

4. A New Backup Generator Is Not Eligible for Section 406 Hazard Mitigation funding

The Arbitration Request references prior unsuccessful attempts to secure funding for the new backup generator through discretionary funding authorized by the Stafford Act to mitigate or protect against damage from future disasters, more commonly referred to as PA hazard mitigation. See Exhibit 1 at 3; 42 U.S.C. § 5172(e); see also § 5170c<sup>6</sup>. However, costs associated with the Applicant's requested new backup generator are not eligible pursuant to applicable FEMA Response and Recovery Policy 9526.1 (1998), which limits eligibility to those mitigation measures that are related to eligible disaster- caused damage at the eligible facility, and which directly reduce the potential for similar future damage at that eligible facility. See Exhibit 10 at 2. The costs associated with the requested backup generator cannot be eligible pursuant to FEMA Response and Recovery Policy 9526.1 (1998), because the installation of a new backup generator at the facility is: (1) not related to repair work required as a result of the disaster, and (2) will not directly reduce the potential for similar future disaster damage at the facility. See id. at 1-2.

FEMA notified the Applicant in writing that the generator is not eligible for PA hazard mitigation funding under Section 406 of the Stafford Act (42 U.S.C. § 5172(e)), because the generator did not exist prior to the disaster. See Applicant Exhibit at 00069-00070. FEMA PW

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<sup>6</sup> FEMA informed the Applicant that "stand alone generators and related equipment purposes are not eligible" under Hazard Mitigation Grant Program (HMGP) authorized by Section 404 of the Stafford Act. See Applicant Exhibit 00069. HMGP funding determinations are not subject to review by the Panel pursuant to 44 C.F.R. § 206.209, because these decisions are not appealable under 44 C.F.R. § 206.206.

18528 expanded upon this explanation by stating that PA mitigation funding is not eligible because: “The requested 4MW power generator was not an element of the plant prior to the disaster, does not exist today, and is not a damaged element of the wastewater treatment plant.” See Applicant Exhibit at 00026.

In response, the Applicant’s first appeal cited FEMA Response and Recovery Policy 9526.1 (1998) in support of its claim that a new backup generator could be funded with PA hazard mitigation funds. See Applicant Exhibit 0003. Although the Applicant accurately quoted FEMA policy in its first appeal, the quote is taken out of context and is not applicable to wastewater treatment plants.<sup>7</sup> See Exhibit 10. As stated in FEMA Response and Recovery Policy 9526.1, a potential mitigation measure is determined to be cost-effective if, *inter alia*, the measure would prevent future similar damage and is directly related to the eligible damaged elements. See Exhibit 10.

FEMA’s first appeal decision explained that the proposed generator would not prevent future similar damage, and is not related to eligible damaged elements of the facility. See Applicant Exhibit at 00005. Notwithstanding the possibility that a new backup generator may maintain power to the EBWTP in the event of an outage affecting Entergy substations, the Applicant failed to provide information indicating that the generator would prevent damage to the wastewater treatment facility from storm surge, flooding, and high winds similar to that which devastated the EBWTP facility during Hurricane Katrina.

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<sup>7</sup> The Applicant quoted the Appendix to FEMA Response and Recovery Policy 9526.1 (1998), which lists potentially eligible PA mitigation measures *per the type of eligible facility*. The Applicant correctly notes that “looped distribution service or other redundancies in the electrical service to critical facilities” are potentially eligible PA mitigation measures, but the Applicant fails to note that such PA mitigation measures are potentially eligible in relation to eligible electric power distribution facilities. See Exhibit 10 at 7.

Furthermore, the requested generator is not an eligible PA mitigation measure because it is not related to a disaster-damaged element of the wastewater treatment facility. On-site backup power generation was not a pre-disaster function of the facility, nor was it part of the design capacity of the facility. See Applicant Exhibit at 00057. Prior to the disaster, primary and secondary power was generated and transmitted to the EBTWP by an ineligible applicant (Entergy) at an off-site, ineligible facility. Id. In sum, the requested mitigation measure is ineligible because it would be applied to the damaged elements of an ineligible facility, i.e., Entergy's ineligible substations. For the above described reasons, FEMA's denial of PW 13231 and PW 18528 on these grounds was consistent with applicable law and policy, and therefore was not arbitrary or capricious.

### **CONCLUSION AND RECOMMENDATION**

Section 406 of the Stafford Act does not authorize the funding of an onsite backup power generator at the EBWTP. FEMA's decision to deny funding for such onsite backup power generation at the EBWTP has a reasonable basis and is entitled to deference. Therefore, FEMA respectfully requests this panel uphold FEMA's denial of PW 13231 and PW 18528, totaling \$6,265,000, and deny the Applicant's request for the associated costs of a new backup generator at the EBWTP.

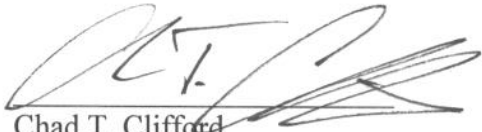
FEMA Public Assistance funding eligibility is limited to the restoration of damaged facilities owned and operated by the Applicant to the pre-disaster function and design capacity of the facility, in accordance with applicable codes and standards in effect at the time of the disaster. See 44 C.F.R. § 206.226. However, the pre-disaster function and design capacity of the EBWTP

did not include a backup generator on site. Rather, prior to the disaster, Entergy New Orleans supplied backup power to the EBWTP. As detailed herein, the requested generator was not required by any code or standard in effect at the time of the disaster, nor has the Applicant demonstrated that the requested generator is currently required by an applicable post-disaster code or standard. While FEMA PA may also fund certain cost effective hazard mitigation measures, the requested generator does not meet PA eligibility criteria for hazard mitigation. See id. and Exhibit 10. Thus, FEMA's denial of PW 13231 and PW 18528 is consistent with the Stafford Act and applicable FEMA regulation and policy. As such, FEMA's decisions in regard to this matter were reasonable, and were not arbitrary and capricious, nor an abuse of discretion, and were otherwise consistent with applicable law.

## LIST OF EXHIBITS

- Exhibit 1 – Applicant’s Request for Arbitration dated October 15, 2009.
- Exhibit 2 – Major Disaster Declaration FEMA-1603-DR-Louisiana.
- Exhibit 3 – Emergency Generator PWs (PWs 321, 1164, 4161, 5400, 5909, and 10093).
- Exhibit 4 – Emergency Generator Time Extension PW 13927.
- Exhibit 5 – Email from Long Nguyen, Entergy New Orleans to Johan Jackson, FEMA dated May 7, 2009.
- Exhibit 6 – Applicant first appeal letter dated January 14, 2009.
- Exhibit 7 – GOHSEP first appeal letter dated March 18, 2009.
- Exhibit 8 – Sewerage and Water Board of New Orleans appeal withdrawal letter dated October 15, 2009 (revised 10/16/09).
- Exhibit 9 – GOHSEP support of Applicant’s Arbitration Request dated October 29, 2009.
- Exhibit 10 – FEMA Response and Recovery Policy Number 9526.1 – *Hazard Mitigation Funding Under Section 406 (Stafford Act)*, dated August 13, 1998; and Appendix, dated April 29, 1998.
- Exhibit 11 – About Entergy New Orleans.
- Exhibit 12 – U.S. Environmental Protection Agency, “Emergency Order Responding to Hurricane Katrina Aftermath,” CWA Docket No. CWA-06-2006-1852

Respectfully submitted on this \_\_\_\_th day of November 2009 by,



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